LIBRARY
SUPREME COURT, U.S.

No. 71-397

Supreme Court, U.S.
FILED
SEP 17 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

CAPITAL ELECTRIC POWER ASSOCIATION, ET AL.,
Petitioners,

v.

FEDERAL POWER COMMISSION and
MISSISSIPPI POWER & LIGHT COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

T. HARVEY HEDGEPETH
Hedgepeth and McDavid
1501-1510 Deposit Guaranty
Bank Bldg.
Jackson, Mississippi 39205

WILLIAM C. WISE
Suite 700, 818 18th Street, N.W.
Washington, D. C. 20006

Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute and regulation involved	2
Statement	2
Reasons for granting the writ	5
Conclusion	14
Appendices:	
A. Court of appeals order	A1
B. Court of appeals order denying petition for rehearing	A2
C. Commission's opinions and orders	A3
D. Statute and regulation involved	A11

CITATIONS

Cases:

Atlantic Refining Co. v. *Public Service Com'n.*, 360 U.S. 378, 388, 389	9
Cities Service Gas Co. v. *Federal Power Com'n.*, 255 F. 2d 860 (1958)	10
Delmarva Power & Light Company, —— F.P.C., ——, Docket No. E-7560, Order issued November 27, 1970	12
FPC v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956)	3, 7, 9, 10, 11
Jupiter Corp. v. *Federal Power Commission*, 424 F. 2d 783, 788 (1969)	10
Mississippi River Fuel Corp. v. *Federal Power Com'n.*, 281 F. 2d 919 (1960)	10
Mobile Gas Service Corp. v. *Federal Power Commission*, 215 F. 2d 883 (1954)	10
Natural Gas Pipe Line Co. v. *Federal Power Com'n.*, 253 F. 2d 3 (1958)	10

Cases—Continued Page

Pan American Petroleum Corp. v. *Federal Power Commission*, 352 F. 2d 241 (1965) 10
Permian Basin Area Rate Cases, 390 U.S. 747, 833 10
Phillips Petroleum Co. v. *Federal Power Com'n.*, 227 F. 2d 470 10
Phillips Petroleum Co. v. *Federal Power Com'n.*, 258 F. 2d 906 (1958) 10
Pure Oil Co. v. *Federal Power Com'n.*, 299 F. 2d 370 (1962) 10
Shell Oil Company, 29 FPC 498, 851 (1963) 12
Shell Oil Co. v. *Federal Power Commission*, 334 F. 2d 1002, 1007 (CA 3, 1964) 10, 13
Sierra-Pacific Power Co. v. *Federal Power Commission*, 220 F. 2d 605 (1955) 10
South Carolina Generating Co. v. *Federal Power Com'n.*, 249 F. 2d 755 10
Sunray Mid-Continent Oil Company v. *Federal Power Commission*, 364 U.S. 137, 155 (1960) 10
Tyler Gas Service Co. v. *Federal Power Com'n.*, 247 F. 2d 590 (1957) 10
United Gas Pipe Line Company v. *Memphis Light, Gas and Water Division, et al.*, 358 U.S. 103 (1958) 5, 11, 12
United Gas Pipe Line Company v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) 3, 7, 8, 9, 10, 11

Statutes:

Federal Power Act, Act of June 10, 1920, 41 Stat. 1063, as amended, 16 U.S.C. 791a-825r:

Section 205, 16 U.S.C. 824 ..... 5, 7
Section 205(c), 16 U.S.C. 824d(c) 2
Section 205(d), 16 U.S.C. 824d(d) 2, 5, 7, 9, 12
Section 205(e), 16 U.S.C. 824d(e) 2, 8
Section 206, 16 U.S.C. 824e 5, 7
Section 206(a), 16 U.S.C. 824e(a) 2, 8, 9
Section 309, 16 U.S.C. 825h 2, 9

Natural Gas Act, Act of June 21, 1938, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w:

Section 5(a), 15 U.S.C. 717d 6, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

CAPITAL ELECTRIC POWER ASSOCIATION, ET AL.,
Petitioners,

v.

FEDERAL POWER COMMISSION and
MISSISSIPPI POWER & LIGHT COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Capital Electric Power Association, Coahoma Electric Power Association, Delta Electric Power Association, Magnolia Electric Power Association, Southern Pine Electric Power Association, Southwest Mississippi Electric Power Association, Twin County Electric Power Association and Yazoo Valley Electric Power Association petition for a writ of certiorari to review the order of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

No opinion was written by the Court of Appeals. The orders of the Federal Power Commission (App. C, *infra*, pp. A3-A13), are not yet reported.

JURISDICTION

The order of the Court of Appeals (App. A, *infra*, p. A1) was entered on May 13, 1971. A timely petition for rehearing was denied on June 21, 1971 (App. B, *infra*, p. A2). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act (16 U.S.C. 8251(b)).

QUESTION PRESENTED

Whether the Federal Power Commission properly accepted for filing under Section 205(d) of the Federal Power Act rate schedule supplements tendered by a public utility which increased, without the agreement of the customers, rates specified in long-term contracts, which contracts permitted only such changes in the specified rates "as may be authorized by duly constituted regulatory authority."

STATUTE AND REGULATION INVOLVED

Sections 205(c), (d) and (e), 206(a) and 309 of the Federal Power Act (16 U.S.C. 824d(c), (d) and (e), 824e(a) and 825h, respectively), and Section 35.4 of the Federal Power Commission's Regulations Under The Federal Power Act (Order 271, 28 F.R. 10572, October 2, 1963) are involved in this case and are set out in App. D, *infra*, pp. A14-A16.

STATEMENT

This case involves the Federal Power Commission's determination that a public utility may unilaterally increase its rates specified in long-term contracts without the consent of the customers merely by filing revised rate schedules with the Commission pursuant to Section 205(d) of the Federal Power Act if the contracts "con-

template changes in the rates and charges specified therein by or with the approval of this Commission," despite the fact that *Mobile* and *Sierra*, *infra*, make it clear that the language of the contracts involved does not authorize unilateral changes by the utility merely by filing superseding rate schedules pursuant to Section 205(d).

1. Mississippi Power & Light Company (MP&L), a public utility subject to the jurisdiction of the Federal Power Commission (Commission), filed as rate schedule supplements, pursuant to Section 205(d) of the Federal Power Act (Act), changes in rates for sales to Petitioners, eight rural electric cooperative customers of MP&L. The supplemental rate schedules increased the revenues from the Petitioners by more than 13%. (App. C, *infra*, pp. A3-A4).

Petitioners filed a joint protest and petition to intervene and for rejection of the rate schedules submitted for filing in which they asserted that the tendered rate schedules would produce an excessive return to MP&L and that the fuel clause contained therein was unlawful, and requested the Commission to reject the tendered rate schedules on the ground that MP&L's existing term contracts with Petitioners preclude unilateral rate increase filings by it and, accordingly, the Commission lacks authority to accept the tendered rate changes, as settled by this Court in *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (App. C, *infra*, pp. A4-A5).

The rate provision in the long-term contracts involved reads:

> "Rate. Association shall pay Company for electric power and energy furnished hereunder for its own use and for resale directly to ultimate consumers in accordance with Rate Schedule REA-10, attached hereto and made a part hereof.

> Service shall be taken and paid for under and in accordance with said rate schedule as provided above or such other effective superseding rate schedule as may be authorized by duly constituted regulatory authority. Either party may seek authorization through regulatory procedures for such change as may be necessary to make any schedule used for billing just and reasonable." (App. C, *infra*, p. A6)

The Commission brushed aside the Petitioners' contention with only this sparse discussion of the issue raised by the Petitioners:

> "The Company indicates that the contracts prior to the *Sierra* case *supra* contained no provision for any rate other than the particular rate specified therein. Construing the above provision in the context of the entire rate agreement as here consummated, we conclude that the provisions of these rate contracts contemplate changes in the rates and charges specified therein by or with the approval of this Commission. Hence, they do not constitute fixed rate contracts. See *United Gas Pipe Line Company* v. *Memphis Light, Gas and Water Division, et al.*, 358 U.S. 103 (1958). We shall deny the petition for rejection of the proffered rate filings." (App. C, *infra*, p. A6).

The Commission denied the Petitioners' application for rehearing in which Petitioners indicated the several errors appearing in the Commission's order and again requested the Commission to reject the rate schedules tendered for filing, or in the alternative to suspend such filings for a period of five months and order a hearing to be held on the sole issue as to whether or not the filing should be rejected. In denying the application for rehearing, the Commission again accorded only the most summary and superficial consideration to the issues raised by the Petitioners. Its only comment relating thereto was:

> "In our order of January 21, 1971, we considered petitioners' contention that the currently effective

rate contracts with Mississippi do not provide for unilateral rate change filings and, therefore, are invalid. After review of the contracts involved we found this argument to be lacking in merits and find no new arguments raised by petitioners in their motion to change our view." (App. C, *infra*, p. A12.)

2. The Petitioners thereupon filed with the Court below a petition for review of the order of the Commission pursuant to Section 313(b) of the Federal Power Act.

Mississippi Power & Light Company was granted leave to intervene.

Without oral argument, the Court of Appeals granted the Commission's motion to dismiss and denied the petition for review in a summary order containing no discussion other than the comment: "see *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division, et al.*, 358 U.S. 103 (1958)" (App. A, *infra*, p. A1).

On June 21, 1971, the Court of Appeals denied a timely filed petition for rehearing (App. B, *infra*, p. A2).

REASONS FOR GRANTING THE WRIT

The issue presented by this case is of fundamental importance to the administration of the Federal Power Act. It involves the interpretation of Sections 205 and 206 of that Act and the determination as to whether a rate increase made by a public utility and filed with the Commission pursuant to Section 205(d) becomes effective as the result of "authorization" by the Commission. The decision of the Commission that a public utility may unilaterally increase its rates without the agreement of the customers merely by filing with the Commission the notice thereof pursuant to Section 205(d), even though long-term contracts between the utility and the customers specify fixed rates which may only be changed by authorization of a duly constituted regulatory authority,

if permitted to stand, will have a most disruptive effect on the regulation of not only the rates of public utilities under the Federal Power Act, but also of the rates of natural gas companies under the Natural Gas Act (15 U.S.C. 717-717w) inasmuch as the rate provisions of the two Acts are virtually identical.

The Commission's action makes a shambles of those Acts so far as the consumer interests which they were designed to protect are concerned. Most of the electric utilities purchasing electric energy at wholesale from public utilities subject to regulation by the Commission represent very small distribution systems. There are a few relatively small, investor-owned electric companies which purchase most of their energy requirements at wholesale. There are approximately one thousand non-profit, consumer-owned rural electric cooperatives, including the Petitioners, which are borrowers from the Rural Electrification Administration. Most of these are small distribution systems purchasing their supply of electricity at wholesale (REA Bulletin 1-1, 1969, United States Department of Agriculture). There are approximately five hundred municipal electric systems, most of which are also small and purchase their electric requirements at wholesale (FPC S-200, Statistics Of Publicly Owned Electric Utilities In The United States, 1969).

Thus, most of the utility systems which will be affected by the decision herein are consumer-owned. These small systems cannot operate successfully if they are unable to plan the development of their systems based on contracts for a supply of energy for a reasonable number of years. The Commission's decision represents a real threat to the continuation of the pluralistic nature of the electric utility industry in this country for which there is a substantial public need, as well as to the successful operation of the rural electrification program instituted by Congress.

The decision of the Court of Appeals is in conflict with the applicable decisions of this Court, is also in conflict with the decisions of four other Courts of Appeals, and also represents an intra-circuit conflict. Moreover, the interpretation of Section 205 here is in conflict with the interpretation placed upon it by the Commission, itself, in other cases.

1. The error in the decisions of the Commission and the Court of Appeals results from a failure to comprehend the pattern of rate regulation specified by Congress in Sections 205 and 206 of the Federal Power Act, which pattern was carefully analyzed and clearly explained by this Court in the opinions in *Mobile* and *Sierra*. The Commission simply refuses to accept the searching analysis set forth in those opinions. Such analysis is indispensable to an understanding of the language used in the contracts between MP&L and Petitioners in which it was provided that a specified rate should be paid "or such other effective superseding rate schedule as may be authorized by duly constituted regulatory authority", and in which it was further provided that "either party may seek authorization through regulatory procedures for such change as may be necessary to make any schedule used for billing just and reasonable."

Mobile and *Sierra* could not demonstrate more clearly than they do that the Federal Power Commission does not "authorize" a rate schedule as the result of a filing made by a public utility under Section 205(d).

2. Mobile explains that a filing under Section 205(d) of a rate change does not constitute the filing of a proposed change but a notice to the Commission of a change made by the company, and the change is effected, if at all, not by an order of the Commission, but solely by virtue of the company's own action. If the company has the power to make the change, it is completed upon compliance with the notice requirement and the new rate has

the same force as any other rate—it can be set aside only upon being found unlawful by the Commission. No proceeding is initiated by the filing. Any proceeding to review the new rate is initiated under Section 205(e) by the Commission in the same manner as a proceeding under Section 206(a) to review any other rate, i.e., upon complaint or the Commission's own motion. Although interim suspension power is given to the Commission by Section 205(e), the character of the proceeding remains simply a review by the Commission of a rate established by the company. "In short, the Act provides no 'procedure' either for making or changing rates; it provides only for *notice* to the Commission of the rates established by natural gas companies (public utilities) and or for review by the Commission of those rates" (350 U.S. 343).

Thus, it is indisputable that the contract language which recognizes the possibility of a superseding rate schedule "as may be authorized by duly constituted regulatory authority" could not possibly mean that the company could unilaterally increase the rates by giving notice to the Commission through a filing of a rate change under Section 205(d).

As this Court pointed out in *Mobile*, although its interpretation precludes companies from unilaterally changing their contracts when the contracts do not permit them to do so, it does provide them with an avenue of relief when their interests coincide with the public interest since Section 206(a) authorizes the Commission, either upon its own motion or upon complaint, to investigate rates, and after a hearing, if it determines the contract rate to be so low as to conflict with the public interest, to authorize the company to file a schedule increasing the rate (350 U.S. 344-345).

Obviously, the contract language in question has reference to a Section 206(a) proceeding. The one minor

difference between the Natural Gas Act language and the Federal Power Act language relating to rates is that Section 5(a) of the Natural Gas Act does not authorize the natural gas company to file a complaint against its own rates, whereas Section 206(a) of the Federal Power Act permits a public utility to do so.

Hence, MP&L is authorized in the contract language involved in this proceeding to seek authorization for a change in its rates by filing a complaint that such rates are too low under Section 206(a). However, any change in rates resulting from such a procedure would become effective only after the Commission had found the existing rates to be unlawful and had fixed by order the reasonable rates to be charged thereafter. Moreover, as explained in this Court's opinion in *Sierra*, in a 206(a) proceeding involving a rate fixed by contract—

> ". . . the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." (350 U.S. 355.)

Mobile also explained that a new schedule filed under Section 205(d), where an increase not agreed to by the customer is not permitted by the contract, is a nullity and the contract rate remains the only lawful rate. There can be no doubt of the authority of the Commission to reject the unauthorized filing under its general powers granted by Section 309 of the Act and its failure to do so and its order "permitting" the new rates to become effective were in error (350 U.S. 347).

3. The decisions of the Commission and the Court of Appeals are in direct conflict with this Court's holdings in *Mobile* and *Sierra*. The holdings in those cases were followed in *Atlantic Refining Co.* v. *Public Service Com'p.*, 360 U.S. 378, 388, 389; *Sunray Mid-Continent*

Oil Company v. *Federal Power Commission*, 364 U.S. 137, 155 (1960); and *Permian Basin Area Rate Cases*, 390 U.S. 747, 833.

The Court of Appeals' decision also conflicts with the decisions of the Third Circuit in the following cases: *Mobile Gas Service Corp.* v. *Federal Power Commission*, 215 F.2d 883 (1954), which was affirmed in *Mobile; Natural Gas Pipe Line Co.* v. *Federal Power Com'n.*, 253 F.2d 3 (1958); and *Shell Oil Co.* v. *Federal Power Commission*, 334 F.2d 1002, 1007 (1964).

It conflicts with the decision of the Fourth Circuit in *South Carolina Generating Co.* v. *Federal Power Com'n.*, 249 F.2d 755.

It conflicts with the decision of the Seventh Circuit in *Pure Oil Co.* v. *Federal Power Com'n.*, 299 F.2d 370 (1962).

It conflicts with decisions of the Tenth Circuit in *Phillips Petroleum Co.* v. *Federal Power Com'n.*, 227 F.2d 470, *cert. den.*, 350 U.S. 1005; *Cities Service Gas Co.* v. *Federal Power Com'n.*, 255 F.2d 860 (1958); *Phillips Petroleum Co.* v. *Federal Power Com'n.*, 258 F.2d 906 (1958); and *Pan American Petroleum Corp.* v. *Federal Power Commission*, 352 F.2d 241 (1965).

The Court of Appeals also is in conflict with its own opinions in *Sierra-Pacific Power Co.* v. *Federal Power Commission*, 220 F.2d 605 (1955), aff'd. in *Sierra; Tyler Gas Service Co.* v. *Federal Power Com'n.*, 247 F.2d 590, *cert. den.* 355 U.S. 895 (1957); *Mississippi River Fuel Corp.* v. *Federal Power Com'n.*, 281 F.2d 919 (1960); and *Jupiter Corp.* v. *Federal Power Commission*, 424 F. 2d 783, 788 (1969).

Each of the cases cited above applied the rule pronounced in *Mobile* and *Sierra.*

Neither the Commission nor the Court of Appeals offered any justification for their refusal to follow *Mobile*

and *Sierra* other than to cite *Memphis*. It is submitted that *Memphis* in no respect changes the rule laid down in *Mobile* and *Sierra* that a rate change by a company of which it gives notice to the Commission by filing superseding rate schedules under Section 206(d) becomes effective, if at all, not by "authorization" by, or by any other action by, the Commission, but solely as a result of the filing company's own action. *Memphis* merely held, as did *Mobile* and *Sierra*, that whether or not a company may unilaterally increase rates provided for in a contract depends entirely upon the provisions of the contract and not upon the provisions of the Federal Power Act. In *Memphis*, the contract language permitted such increase. In *Mobile* and *Sierra*, it did not. Here the contract language is vitally different from that in *Memphis*. There, the rate was to be the company's rate schedule in effect at the time the contract was entered into "or any effective superseding rate schedules, on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof." (358 U.S. 103)

In that language there is no requirement that the company obtain any approval of a rate change. It was made clear that the parties intended that the company could unilaterally increase the rate at any time by filing a new schedule with the Commission.

Memphis reiterated the protection of the integrity of contracts emphasized in *Mobile* and *Sierra*. It emphasized that the Court was in no respect departing from its holdings in the latter two cases. It found that the contract explicitly permitted the unilateral increase. The company has the right to change its rates at will "unless it has undertaken by contract not to do so." (358 U.S. 113.)

It is respectfully suggested that an erroneous reading of *Memphis* by the Commission caused it to cite that case as authority for its conclusion that the contracts do "not constitute fixed rate contracts" because in its opinion they "contemplate changes in the rate and charges specified therein by or with the approval of this Commission." (App. C, *infra*, p. A6.)

As pointed out above, what *Memphis* held was that both the company and the customer were bound by the terms of their contracts. The fact that the instant contracts permit the company to increase the rates if authorized to do so by the Commission, could not possibly mean that it could increase the rates in some other fashion, e.g., unilaterally, by giving notice to the Commission by filing under Section 205(d).

4. The Commission's decision is in conflict with its own decision in *Delmarva Power & Light Company*, —— FPC ——, Docket No. E-7560, order issued November 27, 1970, in which the contracts involved contemplated that rate changes might take place in certain circumstances. It also conflicts with its decision in *Shell Oil Company*, 29 FPC 498, 851 (1963).

The Commission in its Regulations Under The Federal Power Act does indicate that it recognizes the teaching of Mobile when it provides in Section 35.4 that permitting a rate schedule to become effective shall not constitute approval by the Commission of such rate schedule (App. D, *infra*, p. A16).

5. To the best of Petitioners' knowledge and belief, no public utility under the Federal Power Act subsequent to the issuance of the opinion by this Court in *Sierra* had attempted to increase without the consent of the customer a rate contained in a contract containing language similar to that in issue in this case until MP&L and several other companies attempted to do so during the

past year. If they are successful, a deluge of such increases can be anticipated. The likelihood of numerous other cases reaching the Courts of Appeals is substantial. The protection of the consumer interest, which is the primary purpose of the Act, requires review by this Court in this case.

6. In view of the protest filed by Petitioners against the proposed increase of contractually established rates, the Commission lacked authority to reject the protest summarily. It was incumbent upon it to conduct a hearing to determine whether the increases were contractually supported. *Shell Oil Company* v. *Federal Power Commission*, 334 F.2d 1002, 1007 (CA 3, 1964). Such a hearing was requested by Petitioners. The Petitioners assert that if such a hearing had been held they could have shown that the parties to the contracts had always indicated by both their actions and their statements that it was never intended that MP&L was to be permitted unilaterally to increase its rates, and that MP&L, which prepared the contracts, had explicitly stated that the language relating to "authorized" superseding rate schedules was inserted only for the purpose of permitting the substitution of a new rate through proper regulatory procedures if the existing rate, which was lower than MP&L's rates to other wholesale customers, was ever to be held to be discriminatory by a Court or regulatory agency. The Petitioners also assert that had it not been for this assurance, they would not have signed the contracts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

T. HARVEY HEDGEPETH
Hedgepeth and McDavid
1501-1510 Deposit Guaranty
Bank Bldg.
Jackson, Mississippi 39205

WILLIAM C. WISE
Suite 700, 818 18th Street, N.W.
Washington, D. C. 20006

Attorneys for the Petitioners

September 17, 1971.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1970

No. 71-1237

[Filed May 13, 1971, /s/ Nathan J. Paulson, Clerk]

CAPITAL ELECTRIC POWER ASSOCIATION, ET AL.

v.

FEDERAL POWER COMMISSION,
Respondent,
MISSISSIPPI POWER & LIGHT COMPANY,
Intervenor.

Before: McGOWAN, MACKINNON and WILKEY, Circuit Judges.

ORDER

On consideration of respondent's motion to dismiss the petition for review, of petitioners' motion for stay pending review and of the responses filed with respect to the foregoing motions, it is

ORDERED by the Court that respondent's motion to dismiss petition for review is granted and the petition for review herein is dismissed, see *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division, et al.*, 358 U.S. 103 (1958), and, it is

FURTHER ORDERED by the Court that petitioners' motion for stay pending review is denied as moot.

Per Curiam

Circuit Judge Wilkey did not participate in the foregoing order.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1970

No. 71-1237

[Filed June 21, 1971, /s/ Nathan J. Paulson, Clerk]

CAPITAL ELECTRIC POWER ASSOCIATION, ET AL.

v.

FEDERAL POWER COMMISSION,
Respondent,

MISSISSIPPI POWER & LIGHT COMPANY,
Intervenor.

Before: McGOWAN, MacKINNON and WILKEY, Circuit Judges.

ORDER

On consideration of petitioner's petition for rehearing, it is

ORDERED by the Court that petitioner's aforesaid petition is denied.

Per Curiam
For the Court:

NATHAN J. PAULSON
Clerk

Circuit Judge Wilkey did not participate in the foregoing order.

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: JOHN N. NASSIKAS, Chairman;
LAWRENCE J. O'CONNOR, JR.,
JOHN A. CARVER, JR., and
ALBERT B. BROOKE, JR.

Docket No. E-7577

MISSISSIPPI POWER & LIGHT COMPANY

ORDER SUSPENDING TENDERED RATE SCHEDULES, DENYING PETITION FOR REJECTION OF RATE FILINGS, GRANTING WAIVER OF NOTICE REQUIREMENTS, PROVIDING FOR HEARING AND GRANTING INTERVENTION

(Issued January 21, 1971)

This order suspends for one day the operation of tendered rate schedules, orders a public hearing to be held on the lawfulness of those schedules, denies a petition for rejection of those rate filings, grants waiver of notice requirements, and permits intervention in this proceeding.

Mississippi Power & Light Company (MP&L), a public utility subject to the jurisdiction of this Commission, filed on November 16, 1970, as rate schedule supplements, changes in rates for sales to its eight rural electric cooperative customers at each of 67 delivery points. MP&L proposes to replace the present rates REA-10 and REA-9 applicable to cooperatives by a new rate REA-11. The proposed rate schedule supplements are identified in the Appendix attached hereto. The filings are proposed to become effective January 22, 1971.

The proposed rate contains an energy charge of 8.15 mills per kwh and continues a fuel adjustment clause similar to the one in the REA-10 rate. It is anticipated that the rate would provide increased revenues from the cooperatives of approximately $790,000 (13.7%) for the year ending January, 1971 and of approximately $819,000 (13.9%) for the year ending January, 1972.

MP&L contends that on the basis of a study utilizing test year 1969, its present rates to cooperatives produce a 4.39% rate of return while the proposed rates show a 5.81% return, still less than fully compensatory but within the Company's past policy of receiving lower rates of return from this class of customers in order to help economic development of rural areas.

MP&L initially proposed an effective date for the present filings of January 20, 1971. However, the original filing was not complete until December 22, 1970, at which time MP&L requested a waiver of the 60-day notice requirement of Section 35.13(b)(4)(i) of the Commission's Regulations in order for the filing to become effective on January 22, 1971, 30 days after completion of the filing. We will grant waiver of that notice requirement subject to the provisions of this order.

Notice of the filing was given by publication in the Federal Register on December 8, 1970 (35 F.R. 18643), stating that any person desiring to be heard or to make any protest with reference to said application should on or before December 22, 1970, file with the Federal Power Commission, Washington, D. C. 20426, petitions or protests in accordance with the requirements of the Commission's Rules of Practice and Procedure.

In addition to preliminary protests from several individual cooperative customers, the Commission received on December 22, 1970, a joint "Protest and Petition to Intervene and for Rejection of Rate Schedules Submitted for Filing" from the Company's eight cooperative cus-

tomers.* The petitioners *inter alia* (1) request intervention in the proceeding; (2) assert that the tendered rate schedules are unlawful under the Federal Power Act because they will produce an excessive return to the Company; (3) allege that the fuel clause in the proffered rate schedules conflicts with the requirements of Section 35.14 (a) (1) of the Commission's Regulations; (4) assert that the proposed increase in rates to the cooperatives is greater than that imposed upon the Company's retail rate customers; (5) request the Commission to reject the tendered rate schedules on the ground that MP&L has currently effective fixed rate contracts which preclude unilateral rate increase filings by the Company; and (6) petition for such further relief as may be appropriate. In a response thereto filed January 8, 1971 following an extension of time by the Commission's Secretary, MP&L denies the allegations that the rate filings would produce an excessive return and that the fuel clause contained therein is not just or reasonable as well as petitioners' contention that provisions of the Company's present contracts with the cooperatives bar the proposed rate increase filings.

Examination of the cooperatives' joint protest and petition and MP&L's answer thereto indicates that certain issues raised therein should be determined on the basis of an evidentiary hearing record. However, our examination of the data filed by MP&L in support of its proposed increased rates and charges does not warrant suspension of those tendered rate schedule supplements for the full 5-month statutory period. Accordingly, we shall suspend the tendered rate schedule supplements for one day and direct that a public hearing be held on the lawfulness thereof.

---

* The cooperative customers are Capital E.P.A., Coahoma E.P.A., Delta, E.P.A., Magnolia E.P.A., Southern Pine E.P.A., Southwest Mississippi E.P.A., Twin County E.P.A., and Yazoo Valley E.P.A. (Petitioners).

Insofar as the joint petition requests rejection of these rate filings, petitioners contend essentially that their currently effective rate agreements with MP&L do not provide for unilateral rate change filings by the Company and therefore such filings are not valid. *F.P.C.* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). In its answer MP&L maintains that the contracts do not fix a specific rate and points to the following provision in the contract for support:

> *Section 3*
>
> *Rate.* Association shall pay Company for electric power and energy furnished hereunder for its own use and for resale directly to ultimate consumers in accordance with Rate Schedule REA-10, attached hereto and made a part hereof.
>
> Service shall be taken and paid for under and in accordance with said rate schedule as provided above or such other effective superseding rate schedule as may be authorized by duly constituted regulatory authority. Either party may seek authorization through regulatory procedures for such change as may be necessary to make any schedule used for billing just and reasonable.

The Company indicates that the contracts prior to the *Sierra* case *supra* contained no provision for any rate other than the particular rate specified therein.

Construing the above provision in the context of the entire rate agreement as here consummated, we conclude that the provisions of these rate contracts contemplate changes in the rates and charges specified therein by or with the approval of this Commission. Hence, they do not constitute fixed rate contracts. See *United Gas Pipeline Company* v. *Memphis Light, Gas and Water Division, et al.*, 358 U.S. 103 (1958). We shall deny the petition for rejection of the proffered rate filings.

The Commission finds:

(1) The tendered rate schedule filings designated in the Appendix attached hereto may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful under the Federal Power Act.

(2) Good cause has been shown to grant MP&L's request for waiver of the 60-day provision of Section 35.13 (b) (4) of the Commission's Regulations under the Federal Power Act.

(3) It is necessary and appropriate for the purposes of the Federal Power Act, particularly Sections 205, 206, 301, 307, 308 and 309 thereof, that the Commission enter upon a hearing concerning the lawfulness of the tendered filings and that the tendered filings be suspended and the use thereof be deferred and a public hearing be initiated in accordance with the procedures set forth below, all as hereinafter provided.

(4) Participation by the aforementioned petitioners for intervention in this proceeding may be in the public interest.

The Commission orders:

(A) MP&L's request for waiver of the 60-day provision of Section 35.13(b) (4) of the Commission's Regulations under the Federal Power Act is hereby granted to permit the tendered filing to take effect 30 days after completion of the filing subject to the provisions of this Order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by the Federal Power Act and pursuant to the Commission's Rules of Practice and Procedure, a public hearing shall be convened at the offices of the Federal Power Commission in Washington, D.C. concern-

ing the lawfulness of MP&L's rate schedules identified in the Appendix hereto.

(C) Pending such hearing and decision thereon, the tendered rate schedules designated in the Appendix attached hereto are hereby suspended and the use therof deferred until January 23, 1971. On that day those filings shall take effect in the manner prescribed by the Federal Power Act, and MP&L, subject to further orders of the Commission, shall charge and collect the increased rates and charges set forth in those filings for all power sold and delivered thereunder.

(D) MP&L shall file with the Commission and serve on all parties, on or before February 23, 1971, its case-in-chief in support of the subject rate schedules, including testimony of witnesses and exhibits. Cross-examination of MP&L's case-in-chief shall commence on March 30, 1971, at 10:00 a.m. (EST) in a hearing room at the offices of the Federal Power Commission, 441 G St., N.W., Washington, D.C. If any party believes that a pre-hearing conference would serve to expedite the proceeding, he may file with the Chief Examiner or the designated Presiding Examiner, on or before February 5, 1971, a motion for a pre-hearing conference, including a statement of how the proceeding would be expedited thereby and a proposed agenda for the conference. In the event that a prehearing conference is scheduled, the Presiding Examiner is authorized to reschedule the date for the commencement of cross-examination if such reschedule is found necessary for the orderly procedure of this hearing. All further procedural dates shall be as ordered by the Presiding Examiner.

(E) MP&L shall refund at such times and in such manner as may be required by final order of the Commission the portion of the increased rates and charges found by the Commission in this proceeding not justified, together with interest at the New York prime rate on

January 23, 1971 from the date of payment until refunded; shall bear all costs of any such refunding; shall keep accurate accounts in detail of all the amounts received by reason of the increased rates and charges effective as of January 23, 1971, for each billing period; and shall report (original and one copy) in writing and under oath, to the Commission monthly, for each billing period, the billing determinants of electric energy sold and delivered under the subject rate schedules, and the revenues resulting therefrom as computed under the rates in effect immediately prior to January 23, 1971, and under the rates and charges made effective by this order, together with the differences in the revenues so computed.

(F) Capital Electric Power Association, Coahoma Electric Power Association, Delta Electric Power Association, Magnolia Electric Power Association, Southern Pine Electric Power Association, Southwest Mississippi Electric Power Association, Twin County Electric Power Association, and Yazoo Valley Electric Power Association are hereby permitted to intervene in this proceeding subject to the Rules and Regulations of the Commission: *Provided, however,* that participation of such interveners shall be limited to the matters affecting asserted rights and interests specifically set forth in the petitions to intervene; and *Provided further,* that the admission of such interveners shall not be construed as recognition by the Commission that they or any of them might be aggrieved by any order entered in this proceeding.

(G) Unless otherwise ordered by the Commission, MP&L shall not change the terms or provisions of the subject rate schedules or of its presently effective rate schedules until this proceeding has been terminated or until the period of suspension has expired.

(H) Notices of intervention and petitions to intervene may be filed with the Federal Power Commission, Wash-

ington, D.C. 20426, on or before February 12, 1971, in accordance with the Commission's Rules of Practice and Procedure (18 CFR 1.8 or 1.37).

By the Commission.

[SEAL]

GORDON M. GRANT
Secretary

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: JOHN N. NASSIKAS, Chairman;
LAWRENCE J. O'CONNOR, JR.,
JOHN A. CARVER, JR., and
ALBERT B. BROOKE, JR.

Docket No. E-7577

MISSISSIPPI POWER AND LIGHT COMPANY

ORDER ACCEPTING TENDERED DOCUMENT FOR FILING, TREATING IT AS A MOTION FOR RECONSIDERATION, AND DENYING SUCH MOTION

(Issued March 22, 1971)

On February 22, 1971, Capital Electric Power Association *et al.*, (Capital) tendered for filing a document entitled "Application of Capital Electric Power Association, *et al.*, for Rehearing", which seeks rehearing of the Commission order issued January 21, 1971 in Docket No. E-7577. That order is a procedural order which, *inter alia*, denied Capital's petition to reject the rate increase filing made by Mississippi Power and Light Company (Mississippi), suspended the filing, granted intervention, and provided for a hearing to determine the lawfulness of the proposed rate increase. An application for rehearing of an interlocutory order, such as herein involved may not properly be filed (Section 1.30(e) of the Commission's Rules of Practice and Procedure [18 CFR 1.30(e)]). However, we shall treat the application as a motion for reconsideration pursuant to Section 1.12 of the Rules and shall consider the arguments advanced therein.

Relying on the *Mobile*[1] *Sierra*[2] line of decisions, Capital asserts that the contracts between Mississippi and petitioners do not permit Mississippi unilaterally to increase its rates to petitioners and that accordingly the increased rates proposed should be rejected. In the alternative, Capital requests that the proposed rate increase be suspended for a period of five months as opposed to the one-day suspension provided for by our order of January 21, 1971 and that the order of January 21, 1971, be stayed until such time as final court action can be completed on a petition for review.

In our order of January 21, 1971, we considered petitioner's contention that the currently effective rate contracts with Mississippi do not provide for unilateral rate change filings and, therefore, are invalid. After review of the contracts involved we found this argument to be lacking in merits and find no new arguments raised by petitioners in their motion to change our view.

In suspending Mississippi's proposed rate increase for one day and allowing increased rates to become effective thereafter subject to refund we noted in our January 21, 1971 order that our examination of the data filed in support of the rate increase did not warrant suspension of the tendered rate schedules for the full five month statutory suspension period. We find no new arguments raised by Petitioners to change this view. In our judgment, the public interest requires adherence to the procedural decisions made in our January 21, 1971 order.

Good cause has not been shown for stay of our order issued January 21, 1971; and, accordingly, Capital's request is denied.

To the extent that the arguments raised in Capital's pleading are restatements of arguments previously made,

---

[1] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

[2] *F.P.C.* v. *Sierra Pacific Power Company*, 350 U.S. 348 (1956).

upon reconsideration, we find no basis for change or modification of our order of January 21, 1971. Furthermore, upon review and consideration of the arguments raised by Capital we find no new facts which would warrant any change or modification in our order of January 21, 1971, in Docket No. E-7577; and accordingly, the motion for reconsideration of Capital is hereby denied.

The Commission finds:

(1) The grounds for reconsideration set forth in Capital's application filed in this proceeding present no facts or legal principles which would warrant any change or modification in our order issued January 21, 1971, in this proceeding.

The Commission orders:

(A) The motion for reconsideration of our order of January 21, 1971 in this proceeding is hereby denied.

(B) Capital's request for stay of our order issued January 21, 1971, is denied.

By the Commission.

[SEAL]

KENNETH F. PLUMB
Acting Secretary

APPENDIX D

STATUTE AND REGULATION INVOLVED

Section 205(c), (d) and (e) of the Federal Power Act reads as follows:

SECTION 205

* * * *

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services. [16 U.S.C. 824d(c)]

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published. [16 U.S.C. 824d(d)]

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the in-

creased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [16 U.S.C. 824d(e)]

Section 206(a) of the Federal Power Act reads as follows:

SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charges, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. [16 U.S.C. 824d (a)]

Section 309 of the Federal Power Act reads as follows:

SEC. 309. The Commission shall have the power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified herein, rules and regulations of the Commission shall be effective thirty days after publication in the

manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [49 Stat. 858-859; 16 U.S.C. 825h]

Section 35.4 of the Federal Power Commission Regulations under the Federal Power Act reads as follows:

§ 35.4 Permission to become effective is not approval.

The fact that the Commission permits a rate schedule or any part thereof or any notice of cancellation to become effective shall not constitute approval by the Commission of such rate schedule or part thereof or notice of cancellation. (Order 271, 28 F.R. 10572, October 2, 1963).

LIBRARY
SUPREME COURT, U. S.

FILED
OCT 18 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 71-397

CAPITAL ELECTRIC POWER ASSOCIATION, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION and MISSISSIPPI POWER & LIGHT COMPANY, *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR MISSISSIPPI POWER & LIGHT COMPANY IN OPPOSITION

HARRY A. POTH, JR.
RICHARD M. MERRIMAN
PEYTON G. BOWMAN, III
BRIAN J. MCMANUS
Reid & Priest
1701 K Street, N.W.
Washington, D.C. 20006

SHERWOOD W. WISE
RICHARD B. WILSON, JR.
Wise, Carter and Child
P.O. Box 651
Jackson, Mississippi 39205

Attorneys for Mississippi Power & Light Company

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement of the case	2
Argument in opposition	3
Conclusion	14

CITATIONS

CASES:

Cities Service Gas Company v. Federal Power Commission, 255 F. 2d 860 (10th Cir. 1958)	5
Delmarva Power & Light Company, — F.P.C. —, Docket No. E-7560, Order issued November 27, 1970	5
F.P.C. v. Sierra Pacific Power Co., 350 U.S. 348 (1956)	5, 6, 8, 9
Jupiter Corporation v. Federal Power Commission, 424 F. 2d 783 (D.C. Cir. 1969)	5
Mississippi River Fuel Corporation v. Federal Power Commission, 281 F. 2d 919 (D.C. Cir. 1960)	5
Mobile Gas Service Corporation v. Federal Power Commission, 215 F. 2d 883 (3rd Cir. 1954)	5
Natural Gas Pipe Line Company v. Federal Power Commission, 253 F. 2d 3 (3rd Cir. 1958)	5
Pan American Petroleum Corporation v. Federal Power Commission, 352 F. 2d 241 (9th Cir. 1965)	5
Phillips Petroleum Company v. Federal Power Commission, 227 F. 2d 470 (10th Cir. 1955)	5
Phillips Petroleum Company v. Federal Power Commission, 258 F. 2d 906 (10th Cir. 1958)	5
Pure Oil Company v. Federal Power Commission, 299 F. 2d 370 (7th Cir. 1962)	5
Shell Oil Company, 29 F.P.C. 498 (1963)	5

Page

Shell Oil Company v. Federal Power Commission, 334 F. 2d 1002 (3rd Cir. 1964) 5
Sierra Pacific Power Company v. Federal Power Commission, 223 F. 2d 605 (D.C. Cir. 1955) 5
South Carolina Generating Company v. Federal Power Commission, 249 F. 2d 755 (4th Cir. 1957) 5
Tyler Gas Service Company v. Federal Power Commission, 247 F. 2d 590 (D.C. Cir. 1957) 5
United Gas Pipe Line Company v. Memphis Light, Gas and Water Division, et al., 358 U.S. 103 (1958) ..2, 4, 6, 7, 8, 9, 10, 11, 13
United Gas Pipe Line Company v. Mobile Gas Service Corporation, 350 U.S. 332 (1956) 5, 6, 8, 9

STATUTES:

Federal Power Act, Act of June 10, 1920, 41 Stat. 1063, as amended, 16 U.S.C. 791a-825r:

Section 205, 16 U.S.C. 824 5
Section 205(d), 16 U.S.C. 824d(d) 2
Section 206, 16 U.S.C. 824e 10
Section 206(a), 16 U.S.C. 824e(a) 10

Natural Gas Act, Act of June 21, 1938, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w:

Section 4(d), 15 U.S.C. 717c(d) 11
Section 4(e), 15 U.S.C. 717c(e) 11
Section 5(a), 15 U.S.C. 717d(a) 10

IN THE

Supreme Court of the United States

No. 71-397

CAPITAL ELECTRIC POWER ASSOCIATION, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION and MISSISSIPPI POWER & LIGHT COMPANY, *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR MISSISSIPPI POWER & LIGHT COMPANY IN OPPOSITION

OPINIONS BELOW

The Petition makes adequate reference to the opinion in the court below and the orders of the Federal Power Commission.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTION PRESENTED

It is respectfully submitted that the following question, rather than the question urged by the Petitioners, is the one correctly here presented, in the light of the order of the Court of Appeals (Petition App. A, p. A1):

Whether the Court of Appeals correctly granted the motion of the Federal Power Commission to dismiss the Petitioners' petition for review in that court on the basis of *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division,* 358 U.S. 103 (1958), because the contracts between Petitioners and Mississippi Power & Light Company (MP&L) provide for a rate increase filing with the Federal Power Commission.

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are set forth in the Petition. In addition, Sections 35.2, 35.4, 35.5, and 35.13 of the Commission's Regulations under the Federal Power Act are involved.

STATEMENT OF THE CASE

This case involves a determination by the Federal Power Commission that the contracts between Petitioners and MP&L contemplated changes in the rates and charges on file with the Commission and, hence, the filing of increased rates by MP&L under Section 205(d) of the Federal Power Act was in accordance with the holding in *Memphis, supra.*

On November 16, 1970, MP&L filed changes in rates for sales to eight rural-electric-cooperative customers to become effective January 22, 1971.

On December 22, 1970, the Commission received a joint "Protest and Petition to Intervene and for Rejection of Rate Schedules Submitted for Filing" from Petitioners. After a response by MP&L on January 8, 1971, the Commission issued an order on January 21, 1971, which stated that certain issues raised by Petitioners should be determined on the basis of an evidentiary hearing and consequently directed that a public hearing be held. (Hearings have been concluded and the proceeding is now before the presiding examiner for decision.) After examining the data filed by MP&L in support of its proposed increased rates, the Commission found that a full five-month statutory suspension period was not justified and suspended the tendered rate schedule supplements for one day. The Commission's order also provided for refunding any portion of the increased rates which were ultimately found to be unjustified.

In this order, the Commission dealt with Petitioners' argument that the rate agreements between them and MP&L did not provide for unilateral rate change filings by the Company and that such filings were invalid, but, as previously indicated, the Commission concluded that the rate contracts contemplated changes in the rates and charges on file with the Commission. Consequently, the Commission denied Petitioners' petition to reject the proferred rate filings.

On February 22, 1971, Petitioners filed an application for rehearing and on March 22, 1971, the Commission issued a second order in this proceeding stating that its rules do not permit an application for rehearing of an interlocutory order. Thereupon, Petitioners filed their petition for review with the Court of Appeals on March 29, 1971.

MP&L was permitted to intervene in the Court of Appeals. As previously indicated the Court of Appeals granted the Commission's motion to dismiss and denied the petition for review. The Court of Appeals also denied a petition for rehearing (Petition App. B, p. A2).

It is noteworthy that throughout Petitioners' "Statement" there runs the theme that somehow it was granted short shrift by the Commission and by the Court of Appeals: The Commission "brushed aside" Petitioners' contention with only a "sparse discussion of the issue" and "accorded only the most summary and superficial consideration to the issues raised by Petitioners" (p. 4). The Court of Appeals dismissed the appeal without oral argument with a "summary" order containing only a reference to the *Memphis* case (p. 5). This indicates the weakness of the Petitioners' contentions.

ARGUMENT IN OPPOSITION

In order to give some emotional appeal to granting the writ, Petitioners, misconstruing the meaning of the Commission's order, paint a frightening picture of the Natural Gas Act and Federal Power Act becoming a "shambles" with the resulting "real threat" to the continuation of the consumer-owned segment of the utility industry.[1] This argument is based upon the allegation that the Commission has permitted MP&L to "unilaterally increase its rates without the agreement of the customers" (p. 5). As shown in this brief the

[1] The reference to the Natural Gas Act is particularly inapposite since the tariffs of "natural gas companies" also contain provisions specifically modeled on the holding in *Memphis*.

opposite is true and the contracts specifically provide for MP&L's rate filing. Further, this argument ignores the provisions of both Acts which provide that any increased rates are collected under bond and any excess in the amount determined to be fair and reasonable must be refunded.

The Petitioners argue, as reasons for granting the writ, that the decision of the court below (a) conflicts with applicable decisions of this Court,[2] (b) conflicts with the decisions of four other courts of appeals,[3] and (c) conflicts with its own decisions.[4] Petitioners further argue that the Commission's interpretation of Section 205 of the Federal Power Act in this case conflicts with its interpretation of that section in other cases.[5]

---

[2] *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

[3] *Mobile Gas Service Corp.* v. *Federal Power Commission*, 215 F.2d 883 (3rd Cir. 1954); *Natural Gas Pipe Line Co.* v. *Federal Power Commission*, 253 F.2d 3 (3rd Cir. 1958); *Shell Oil Co.* v. *Federal Power Commission*, 334 F.2d 1002 (3rd Cir. 1964); *South Carolina Generating Co.* v. *Federal Power Commission*, 249 F.2d 755 (4th Cir. 1957); *Pure Oil Co.* v. *Federal Power Commission*, 299 F.2d 370 (7th Cir. 1962); *Phillips Petroleum Co.* v. *Federal Power Commission*, 227 F.2d 470 (10th Cir. 1955), *cert. den.*, 350 U.S. 1005; *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F.2d 860 (10th Cir. 1958); *Phillips Petroleum Co.* v. *Federal Power Commission*, 258 F.2d 906 (10th Cir. 1958); *Pan American Petroleum Corp.* v. *Federal Power Commission*, 352 F.2d 241 (9th Cir. 1965).

[4] *Sierra-Pacific Power Co.* v. *Federal Power Commission*, 223 F.2d 605 (D.C. Cir. 1955), *aff'd.*, 350 U.S. 348 (1956); *Tyler Gas Service Co.* v. *Federal Power Commission*, 247 F.2d 590 (D.C. Cir. 1957), *cert. den.*, 355 U.S. 895 (1957); *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 281 F.2d 919 (D.C. Cir. 1960); *Jupiter Corp.* v. *Federal Power Commission*, 424 F.2d 783 (D.C. Cir. 1969).

[5] *Shell Oil Company*, 29 F.P.C. 498, (1963); *Delmarva Power & Light Company*, — F.P.C. —, Docket No. E-7560 (Nov. 27, 1970).

The arguments put forth by Petitioners have no merit. They urge (Petition, p. 10) that the *Mobile* and *Sierra* cases decided by this Court are the basis for the decisions by the Courts of Appeals for the Third, Fourth, Seventh, and Tenth Circuits and are in conflict with the decision of the court below, which decision, in turn, they say conflicts with that court's decisions in other cases. In fact, there can be no conflict among the decisions, for, as pointed out in the order of the court below, and by the order of the Commission, the applicable case in point is *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division,* which was decided by this Court after the *Mobile* and *Sierra* cases. *Mobile* and *Sierra* were concerned with *fixed rate* contracts. *Memphis* distinguished these from the changeable rate type of contract such as the ones between MP&L and Petitioners:

> "The United contract now before us, as construed by the Federal Power Commission and as viewed by the Court of Appeals for the purposes of decision, *is vitally different from that in Mobile.* On this view of the contract United bound itself to furnish gas to these customers during the life of the agreements *not at a single fixed rate,* as in Mobile, but at what in effect amounted to its current 'going' rate. Contractually this left United free to change its rates from time to time, subject, of course to the procedures and limitations of the Natural Gas Act. In such circumstances there is nothing in Mobile which suggests that United was not entitled to file its new schedules under § 4(d), or that the Commission had no jurisdiction to consider them under § 4(e)." (358 U.S. 103, 109, 110) (Emphasis added)

In *Mobile,* this Court held that a selling natural gas company could not unilaterally change the rates pro-

vided for in a contract subject to the jurisdiction of the Federal Power Commission unless the contract authorized it to do so. In that case, the contract between United Gas Pipe Line Company and Mobile Gas Service Corp. did not provide for any changes in the agreed rate during the life of the contract, and this Court therefore held that United could not unilaterally increase the rate for natural gas it delivered to Mobile pursuant to that contract. The contractual provision at issue in *Memphis,* on the other hand, read as follows:

> "All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule . . . , *or any effective superseding rate schedules,* on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof." 358 U.S. at 105. (Emphasis the Court's.)

This Court held that the contract thus gave United the right "to change its rates from time to time, subject, of course, to the provisions and limitations of the Natural Gas Act." (358 U.S. at 110.)

The rate provision of the contracts entered into by MP&L and Petitioners is similar to that considered by this Court in *Memphis* and brings this case within that holding. It provides as follows:

> "3. *Rate.* Association shall pay Company for electric power and energy furnished hereunder for its own use and for resale directly to ultimate consumers in accordance with Rate Schedule REA-10, attached hereto and made a part hereof.
>
> "Service shall be taken and paid for under and in accordance with said rate schedule as provided

> above *or such other effective superseding rate schedule as may be authorized by duly constituted regulatory authority. Either party may seek authorization* through regulatory procedures for such change as may be necessary to make any schedule used for billing just and reasonable." (Emphasis added.)

This provision clearly states that the price to be paid for electric power and energy taken under the contract is to be determined according to Rate Schedule REA-10, *or* "such other effective superseding rate schedule as may be authorized by duly constituted regulatory authority." Further, "either party may seek [such] authorization for such change," which is exactly what MP&L did when it filed for a rate increase.

The quoted language is very broad and unrestricted. It embraces any procedures contemplated under the Federal Power Act, including Sections 205 and 206. The rate provision of the contract, in short, explicitly gives MP&L the right to make the rate filings which Petitioners are now challenging.

The Commission and Court of Appeals for the District of Columbia Circuit have not, contrary to Petitioners' assertion, refused to follow the holdings of *Mobile* and *Sierra*. Rather, these cases, as clarified by this Court's holding in *Memphis,* support MP&L's filing, since they hold that a public utility can provide by contract for the right to unilaterally file for a rate increase by complying with the requirements of the appropriate regulatory authority. Scores of such filings have become effective since *Memphis* was decided. Thus, the language used in MP&L's contracts is similar to that in service agreements filed as part of their tariffs by a number of companies regulated by the Com-

mission which, for many years, have been accepted without challenge as meeting the requirements of *Mobile* and *Sierra.*

Prior to the decisions of this Court in 1956 in *Mobile* and *Sierra,* the contracts between MP&L and Petitioners contained a single fixed rate:

> "3. Rate. Association shall pay Seller for all electric energy furnished hereunder at the rates and on the terms and conditions set forth in Rate Schedule REA-8 attached hereto and made a part hereof."

After this Court's decisions in *Mobile* and *Sierra,* new contracts between MP&L and Petitioners specifically provided for rate changes:

> "3. Rate. Association shall pay Seller for electric power and energy furnished hereunder for resale to ultimate consumers in accordance with Seller's Rate Schedule REA-8 attached hereto and made a part hereof, *or such other effective superseding rate schedule as may be authorized by duly constituted regulatory authority.* Either party may seek authorization through regulatory procedures for such change as may be necessary to make any schedule used for billing under this Agreement For Purchase Of Power just and reasonable." (Emphasis added)

As previously pointed out, substantially identical language was considered by the Commission and this Court in the *Memphis* case. It was clear in *Memphis,* as it is here, that the contracts were not fixed price contracts but rather contained provisions for changing the rate during the term of the agreements.

In *Memphis,* the argument was made that:

> "the 'effective superseding rate' clause of the agreements must be read as referring only to

> superseding rates established after a § 5(a) proceeding . . . ." (358 U.S. at 115)[6]

In affirming the Commission's order, this Court rejected that argument by stating that:

> *"the clause would be entirely superfluous if construed as respondents would have it,* since as a matter of law rate changes ordered by the Commission after a § 5(a) proceeding would have been incorporated into the agreements." (Id.) (Emphasis added) [7]

Therefore, it is clear that regardless of what the contracts provide, any prospective changes in rates ordered by the Commission under Section 5(a) for natural gas companies, or Section 206(a) for public utilities, would have to be incorporated into the contracts to be thereafter observed.

The above reasoning demonstrates that Section 3 of the contract between MP&L and Petitioners was not limited to changes under Section 206 of the Federal Power Act, as Petitioners assert (Petition, pp. 7-9). It is unreasonable to believe that the parties intended Section 3 to be a nullity when they renegotiated the contracts and specifically added language permitting rate changes.

The language of these contracts falls squarely within the holding of *Memphis* which affirmed the right of a company to change its rates from time to time, subject, of course, to the procedures and limitations of the

---

[6] Section 5(a) of the Natural Gas Act is comparable to Section 206(a) of the Federal Power Act.

[7] Ibid.

Natural Gas Act or Federal Power Act, whichever is applicable. As this Court said in *Memphis:*

> "The United contract now before us, as construed by the Federal Power Commission and as viewed by the Court of Appeals for the purposes of decision, *is vitally different from that in Mobile.* On this view of the contract United bound itself to furnish gas to these customers during the life of the agreements *not at a single fixed rate,* as in Mobile, but at what in effect amounted to its current 'going' rate. Contractually this left United free to change its rates from time to time, subject, of course, to the procedures and limitations of the Natural Gas Act. In such circumstances there is nothing in Mobile which suggests that United was not entitled to file its new schedules under § 4(d), or that the Commission had no jurisdiction to consider them under § 4(e)." (358 U.S. 103, 109, 110) (Emphasis added)

Petitioners assert that "the Federal Power Commission does not 'authorize' a rate schedule as the result of a filing made by a public utility under Section 205(d)" (Petition, p. 7), and that such filing "does not constitute the filing of a proposed change but a notice to the Commission of a change made by the company, and the change is effected, if at all, not by an order of the Commission, but solely by virtue of the company's own action." (Petition, p. 7) Petitioners' argument is based on a misinterpretation of the word "authorized" and a lack of understanding of the Commission's function under the Federal Power Act. The dictionary (Webster's New Collegiate Dictionary, 1959 Edition) states that one of the meanings of "authorize" is "to permit." A rate schedule becomes effective not solely at the company's pleasure but through "permission" by the Commission. Section 35.4 of the Regulations,

entitled "*Permission* to become effective is not approval," provides: "The fact that the Commission *permits* a rate schedule . . . to become effective does not constitute approval." (Emphasis added)

Similarly, Section 35.2(e) which defines "effective date" states:

> "As used herein the 'effective date' of a rate schedule shall mean the date on which a rate schedule filed and posted pursuant to the requirements of this part is *permitted by the Commission* to become effective as a filed rate schedule. The effective date shall be 30 days after the filing date, or such other date as may be specified by the Commission."

A rate schedule is "tendered" for filing by a utility (Section 35.3) and if the Commission "permits," it becomes effective. Simply because this "permission" may be given without a formal statement on the part of the Commission in no way changes its character. There is nothing unique about the Commission performing an act without a written declaration of it. For example, unless the Commission acts upon an application for rehearing within thirty days after it is filed, "such application shall be deemed to have been denied" (Section 1.34 of the Commission's Rules of Practice and Procedure).

Although "permission" to become effective does not constitute approval of such rate schedule (Section 35.4), it does provide the "authorization" by the Commission necessary to make a superseding rate schedule effective.

It can be assumed that when the parties revised Section 3, they meant its terms to be interpreted in their

normal English meaning. It is highly significant that Webster's definition corresponds exactly with the term used by the Commission in its regulations governing Section 205 filings.

From the foregoing it is clear that, as the Commission found, and the court below agreed, the rate provision in the contract between MP&L and Petitioners was not a "fixed rate contract" but a provision which reserved for MP&L the right to file for a rate increase. Thus, as pointed out by the court below, the controlling case is *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division.* As such, there is no conflict between the decision of the court below and the decisions of this Court or those of other tribunals cited by Petitioners. Therefore, since this Court's decision in the *Memphis* case is fully determinative of the outcome in the present proceeding, it is unnecessary for this Court to grant Petitioners' Writ of Certiorari.

CONCLUSION

WHEREFORE Premises Considered, it appears that there are no special and important reasons for the Court to review this case, and accordingly Mississippi Power & Light Company prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

HARRY A. POTH, JR.
RICHARD M. MERRIMAN
PEYTON G. BOWMAN, III
BRIAN J. MCMANUS
REID & PRIEST
1701 K Street, N. W.
Washington, D. C. 20006

SHERWOOD W. WISE
RICHARD B. WILSON, JR.
WISE, CARTER AND CHILD
P. O. Box 651
Jackson, Mississippi 39205

Attorneys for Mississippi Power & Light Company

PROOF OF SERVICE

Service of this Brief for Mississippi Power & Light Company has been made upon the Federal Power Commission by mailing copies hereof postage prepaid to Mr. Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530, and upon Capital Electric Power Association, et al., by mailing copies hereof airmail postage prepaid to its attorneys this 18th day of October, 1971.

Attorney for Respondent

LIBRARY
SUPREME COURT, U. S.

No. 71-327

In the Supreme Court of the United States

OCTOBER TERM, 1971

CAPITAL ELECTRIC POWER ASSOCIATION, ET AL.,
PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

LEWIS M. GOLDWOLD,
Assistant General Counsel,
Department of Justice,
Washington, D.C. 20530

GORDON GOOCH,
General Counsel,
LEO R. NORTHUP,
Solicitor,
J. EDWARD STAHL,
Trial Attorney, Solicitor,
Federal Power Commission,
Washington, D.C. 20426

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-397

CAPITAL ELECTRIC POWER ASSOCIATION, ET AL.,
PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is not reported. The opinions of the Federal Power Commission (Pet. App. A3–A13) are not yet officially reported.

JURISDICTION

The initial order of the court of appeals (Pet. App. A1 was entered on May 13, 1971, and a timely petition for rehearing was denied on June 21, 1971. The petition

447-311—71

for a writ of certiorari was filed on September 17, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act (16 U.S.C. 825l(b)).

QUESTION PRESENTED

Whether the Federal Power Commission properly concluded that a public utility subject to its jurisdiction is permitted under its contracts with certain customers to file unilateral rate increases.

STATUTES INVOLVED

The pertinent statutory provisions are set forth at Pet. App. A14–A17.

STATEMENT

Petitioners, eight rural electric cooperative customers of the Mississippi Power and Light Company ("Mississippi"), seek review of an order of the court of appeals upholding a Commission decision that Mississippi was entitled under its contracts with petitioners to file unilateral rate increases with the Commission. The applicable provision, common to all the contracts in question, reads (Pet. App. A6)):

> *Rate.* [The] [a]ssociation shall pay Company for electric power and energy furnished hereunder for its own use and for resale directly to ultimate consumers in accordance with Rate Schedule REA–10, attached hereto and made a part hereof.
>
> Service shall be taken and paid for under and in accordance with said rate schedule as provided above *or such other effective super-*

> *seding rate schedule as may be authorized by duly constituted regulatory authority.* Either party may seek authorization through regulatory procedures for such change as may be necessary to make any schedule used for billing just and reasonable. [Emphasis added.]

Acting pursuant to the provision, Mississippi filed with the Commission in November 1970 changes in its rates for sales to petitioners which would increase Mississippi's revenues from petitioners by more than 13 percent (Pet. App. A3–A4). Pursuant to the Commission's notice of the rate increase filing, petitioners protested the increase, alleging, *inter alia,* that the filing should be rejected since Mississippi's contracts with petitioners precluded unilateral rate increase filings (Pet. App. A4–A5).

The Commission rejected petitioner's contention and held that the contracts in question contemplated changes in the rates and charges specified and did not constitute fixed rate contracts (Pet. App. A6). Accordingly, Mississippi had the right to file unilateral rate increases (*ibid.*). At the same time, however, the Commission directed that a hearing be held on other issues raised by petitioners (Pet. App. A7–A8). The rate increases, after a one day suspension, were permitted to go into effect on the condition that Mississippi refund with interest any portion of the increased rates and charges ultimately found to be unjust (Pet. App. A8–A9). Petitioners' application for rehearing was denied (Pet. App. A11–A13).

The court of appeals (Pet. App. A1) dismissed petitioners' petition for review of the Commission's order,

relying on this Court's decision in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103.

ARGUMENT

The decision below is correct and is not in conflict with any decision of this Court or another court of appeals. As the case—involving only the proper interpretation of a contractual provision—is not of general importance, review by this Court is unwarranted.

1. The Commission properly rejected petitioners' argument that the rate contracts between Mississippi and petitioners did not permit Mississippi to increase its rates by filing changes with the Commission. Petitioners rely on *Federal Power Commission* v. *Sierra-Pacific Power Co.*, 350 U.S. 348, and *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, which held that where contracts between utilities subject to the Commission's jurisdiction and their customers provide for fixed rates, the utilities cannot unilaterally file rate increases with the Commission. Those decisions, however, must be read in the light of the Court's subsequent decision in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, *supra*, involving a contractual provision establishing a rate in accordance with a natural gas pipeline company's rate schedule "*or any effective superseding rate schedules*, on file with the Federal Power Commission." 358 U.S. at 105. Distinguishing the *Mobil* case, this Court found that the quoted language effectively reserved the pipeline company's right to file unilateral rate increases in accordance with the applicable pro-

cedures specified in the Natural Gas Act, 15 U.S.C. 717, *et seq.*, 358 U.S. 109–115.

Petitioners attempt to distinguish *Memphis* on the ground that their contracts with Mississippi—which provided for specified rates or "such other effective superseding rate schedules as may be authorized by duly constituted regulatory authority" (see pp. 2–3, *supra*)—required the new rates to be "authorized" by the Commission, a term not included in the contracts under consideration in *Memphis*. Petitioners argue that no approval or other Commission action is necessary for a rate increase filed pursuant to Section 205 of the Federal Power Act (16 U.S.C. 824d) to become effective (Pet. 7–9, 11–12).

Petitioners erroneously equate (Pet. 10–12) Commission authorization with Commission approval of rate increase filings under Section 205 of the Act. As this Court has recognized in *Memphis,* 358 U.S. at 113, 114, when a rate filing is made, the Commission can either reject it, suspend its effective date for up to five months (in this case the new rates were suspended for one day) pending a hearing on the lawfulness of the new rates, or permit it to become effective at the end of the notice period. In view of this power, the Commission's regulations define the effective date of a new rate schedule as the date the schedule is "*permitted* by the Commission to become effective as a filed rate schedule." 18 C.F.R. 35.2(e), emphasis added. Thus, in a very real sense, the Commission "authorizes" the taking effect of new rate schedules, although Commission approval, in terms of

a decision on the lawfulness of the new rates if proceedings under Section 205(e) are instituted, may not follow for some time.

Petitioners argue (Pet. 11) that the "superseding rate schedules" referred to in their contracts with Mississippi are limited to schedules fixed by the Commission following a determination under Section 206(a) of the Act that the original schedules were "unjust, unreasonable, unduly discriminatory or preferential." Such an interpretation, however, would render the contractual provision entirely superfluous. As this Court noted in *Memphis,* in rejecting a similar argument, rate changes ordered by the Commission following a proceeding under Section 5(a) of the Natural Gas Act (similar to Section 206(a) of the Federal Power Act) are, as a matter of law, incorporated into all rate contracts. 358 U.S. at 115–116, n. 10.

2. Petitioners assert (Pet. 10, 12) that the decision below conflicts with other courts of appeals and Commission decisions that have denied the right to make unilateral rate changes. Since the contracts involved in those cases, however, did not contemplate unilateral rate changes, there is no conflict.

3. Petitioner's reliance (Pet. 13) on *Shell Oil Co.* v. *Federal Power Commission,* 334 F. 2d 1002 (C.A. 3) for the proposition that the Commission should have held a hearing to determine the meaning of the word "authorized" in the contracts is unfounded. In *Shell,* the determination whether the contract authorized an increase in rates depended upon whether the

rate charged in another contract was higher than the rate charged in the contract under consideration. To resolve the question, the Commission had to consider certain extrinsic factors to ascertain price comparability and a hearing was thus necessary. 334 F. 2d at 1007–1008. No comparable factual issue exists here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

GORDON GOOCH,
General Counsel,

LEO E. FORQUER,
Solicitor,

J. RICHARD TIANO,
First Assistant Solicitor,
Federal Power Commission.

OCTOBER 1971.

U. S. GOVERNMENT PRINTING OFFICE: 1971

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 29 1971
E. ROBERT SEAVER, CLERK

No. 71-397

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

CAPITAL ELECTRIC POWER ASSOCIATION, ET AL.,
Petitioners,

v.

FEDERAL POWER COMMISSION and
MISSISSIPPI POWER & LIGHT COMPANY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONERS

T. HARVEY HEDGEPETH
HEDGEPETH AND MCDAVID
1501-1510 Deposit Guaranty
Bank Bldg.
Jackson, Mississippi 39205

WILLIAM C. WISE
Suite 700, 818 18th St., N. W.
Washington, D. C. 20006
Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-397

CAPITAL ELECTRIC POWER ASSOCIATION, ET AL.,
Petitioners,

v.

FEDERAL POWER COMMISSION and
MISSISSIPPI POWER & LIGHT COMPANY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONERS

In its Brief In Opposition, the Federal Power Commission erroneously argues that the case involves only the proper interpretation of a contractual provision and is not of general importance. What is involved is, of course, the correct interpretation of Section 205 of the Federal Power Act (16 U.S.C. 842d). This is made clear by the discussion in the Commission Brief in support of its argument and in the Brief For Mississippi Power & Light Company (MP&L) In Opposition. Those

Briefs disclose that all parties agree that the contract provides for the payment for electric power and energy in accordance with a specified rate schedule attached to and made a part of the contract, "or such other effective superseding rate schedule as may be authorized by duly constituted regulatory authority." Thus, if this Court accepts the case for review, its basic decision will not involve the interpretation of contractual language, but will require a determination as to whether or not the Commission under Section 205 of the Act "authorizes" a superseding rate schedule which becomes effective as the result of its being filed with the Commission under that Section.

A substantial portion of both the Commission and the MP&L Briefs represent an attempt to establish that the Commission does "authorize" the taking effect of new rate schedules (Comm. Br. 4-6; MP&L Br. 11-13), thus plainly indicating that the case primarily involves an interpretation of the Federal Power Act and not the meaning of contractual language. There can be no dispute as to the meaning of the language used in the contract once the intent of the Act is established.

As to the argument that the case is not of general importance, we point out that the misinterpretation by the Commission and the Court of Appeals of the decisions in *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *United Gas Pipe Line Company* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958) seriously frustrates the proper administration of the Federal Power Act and also represents a serious threat to the success of the Federal Rural Electrification Administration created by Congress. It is respectfully submitted that many small, mostly consumer-owned, electric distribution systems may be seriously injured and perhaps even forced out

of business if the wholesaling, large utilities are permitted unilaterally to raise rates merely by filing the notice required by Section 205(d) of the Act in instances in which the wholesale contracts contain language similar to that involved here, which language was never intended to permit such unilateral increases.

The Commission contends that "Petitioners erroneously equate (Pet. 10-12) Commission authorization with Commission approval of rate increase filings under Section 205 of the Act" (Comm. Br. 5). There is no basis for this charge. The Petition makes crystal clear that Petitioners' position is that *Mobile* and *Sierra* firmly establish that the Commission does not "authorize" a rate change which becomes effective as a result of a filing under Section 205(d) of the Act.

The Commission argues that when a rate filing is made under Section 205, the Commission can either reject it, suspend its effective date for up to five months, or permit it to become effective at the end of the notice period, and points out that the Commission's Regulations define the effective date of a new rate schedule as the date the schedule is "permitted by the Commission to become effective as a filed rate schedule" (18 C.F.R. 35.2(e)), and adds "Thus, in a very real sense, the Commission 'authorizes' the taking effect of new rate schedules." (Comm. Br. 5).

MP&L makes the same argument (MP&L Br. 11-13). Both agree that "permission" to become effective does not constitute approval of such rate schedule.

The answer to this argument is, of course, that Section 205 contains no reference whatsoever to the Commission "permitting" a rate schedule to become effective. The section merely provides for the seller giving thirty days' notice of the rate change by filing a copy thereof with the Commission. The rate change automatically becomes effective thirty days after the notice having

been given, unless the Commission suspends it pending a hearing.

The use of the word "permitted" in the Commission's Regulation defining the effective date cannot, of course, enlarge the authority of the Commission bestowed upon it by the Act, and a reading of the Regulation makes it clear that the Commission was not attempting to do so. In the Regulation quoted by the Commission and MP&L, there is added this sentence: "The effective date shall be 30 days after the filing date, or such other date as may be specified by the Commission." Obviously, "such other date" is required by the Act to be the date fixed by the Commission if the rate is suspended under Section 205(e) of the Act. The Regulation cannot possibly be used to bolster the argument that the Commission "authorizes" a rate under Section 205.

The complete answer to both the Commission and MP&L was given by this Court in *Mobile* and *Sierra*. In *Mobile* the Court made a most searching analysis of Sections 4 and 5 of the Natural Gas Act (15 U.S.C., Sections 717c and 717d). In *Sierra* it was pointed out that Sections 205(c), (d) and (e) and Section 206(a) of the Federal Power Act are substantially identical to Section 4(c), (d) and (e), and 5(a), respectively, of the Natural Gas Act. The Court further stated that the interpretation of the Natural Gas Act in *Mobile* was equally applicable to the Federal Power Act (350 U.S. 350, 351, 353).

In *Mobile* the Court explained:

> "The relationship of these sections thus affords no support to petitioners' characterization of § 4 (d) and (e) as establishing a rate-changing 'procedure' —a 'proceeding' before the Commission 'initiated' by a natural gas company filing a 'proposed' change. Section 4 (d) provides not for the filing of 'proposals' but for *notice* to the Commission of any 'change . . . made by' a natural gas company, and

> *the change is effected, if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action.* If the purported change is one the natural gas company has the power to make, the 'change' is completed upon compliance with the notice requirement and the new rate has the same force as any other rate—it can be set aside only upon being found unlawful by the Commission. It is thus no more a 'proposed' rate than any other rate, all of which are equally subject to Commission review. Likewise, no 'proceeding' is 'initiated' by a § 4 (d) filing. A proceeding to review the new rate may be initiated under § 4 (e), but, if so, it is initiated by the Commission in the same manner as a proceeding under § 5 (a) to review any other rate, that is, upon complaint or its own motion." (350 U.S. 342). (Emphasis supplied.)

Thus, patently, the Commission does not "authorize" a changed rate filed under Section 205(d) of the Federal Power Act.

The Commission and MP&L also assert that there is no conflict between the decision below and the decisions of this Court and various Courts of Appeals and the Federal Power Commission cited in the Petition at pages 9-12 because the language in the contracts in those cases did not contemplate unilateral rate changes (Comm. Br. 6, MP&L Br. 8-10). This assertion assumes the answer to the issue presented here. Each of those cases follows *Mobile* and *Sierra* and, accordingly, the decision below is in conflict with them since, as demonstrated, the parties to the contracts involved here also could not have contemplated unilateral rate changes because, as held in *Mobile* and *Sierra*, the Commission does not "authorize" such changes when filed under Section 205(d) of the Act.

MP&L states that the applicable case in point is *Memphis* and that the language in the contracts in *Memphis* was substantially identical to the language in

the contracts involved here. MP&L further states that the language of these contracts falls squarely within the holding of *Memphis* (MP&L Br. 6, 9-10). This statement is patently in error, since in *Memphis* the contracts provided that the rates to be paid should be those contained in the existing rate schedule "or any effective superseding rate schedules on file with the Federal Power Commission", and that the agreement should be subject in all respects to such rate schedules and the General Terms and Conditions filed with the Federal Power Commission. There was no restriction whatsoever on the seller's right to file superseding rate schedules with the Commission. In the contracts involved here, for a superseding rate schedule to become effective, it must "be authorized by duly constituted regulatory authority."

The Commission charges that the Petitioners' reliance on *Shell Oil Co.* v. *Federal Power Commission*, 340 F.2d 1002 (CA 3) for the proposition that the Commission was required to hold a hearing on the issue of whether or not the increases were contractually supported was unfounded because of the different factual situation in *Shell* (Comm. Br. 6-7). The facts are that in the opinion in that case the Third Circuit categorically stated that it was incumbent upon the Commission to conduct

such a hearing when a protest is filed against accepting the rate for filing on the grounds of a contractual bar.

Respectfully submitted,

T. HARVEY HEDGEPETH
HEDGEPETH AND MCDAVID
1501-1510 Deposit Guaranty
Bank Bldg.
Jackson, Mississippi 39205

WILLIAM C. WISE
Suite 700, 818 18th St., N. W.
Washington, D. C. 20006
Attorneys for Petitioners

October 29, 1971